SYARIFAH NOORAFFYZZA WAN HOSEN v. DIRECTOR OF JABATAN AGAMA ISLAM SARAWAK & ORS

COURT OF APPEAL, SARAWAK
MOHD ZAWAWI SALLEH JCA
VERNON ONG LAM KIAT JCA
AB KARIM AB JALIL JCA
[CIVIL APPEAL NO: Q-01(A)-45-02-2015]
7 JULY 2017

ISLAMIC LAW: *Syariah Court – Jurisdiction – Jurisdiction to hear apostasy matters – Whether civil court seized with jurisdiction to hear apostasy matters – Whether jurisdiction lies exclusively with Syariah Court – Absence of provisions on apostasy in State Enactment – Whether jurisdiction could be implied – Federal Constitution, art. 121(1A)*

CONSTITUTIONAL LAW: *Federal Constitution – Article 121(1A) – Jurisdiction – Apostasy – Whether civil court seized with jurisdiction to hear apostasy matters – Whether jurisdiction lies exclusively with Syariah Court*

After leaving Islam and embracing Christianity in 2009, the appellant, a Malay by race, proceeded to the National Registration Department to apply for change of her name in her identification card. However, she was informed that the letter of release from Islam ('the letter') from the Director of Jabatan Agama Islam Sarawak ('the first respondent') was required. The appellant requested for the letter from the first respondent but received no reply. The appellant was later informed by the first respondent's office that she had to go to the Syariah Court and attend counselling sessions. The appellant filed an application for *ex parte* leave at the High Court for judicial review against the respondents and sought (i) a declaration that she was a Christian; and (ii) *mandamus* orders to compel (a) the first respondent and/or Majlis Agama Islam ('the second respondent') to issue the letter; and (b) the Director General of National Registration Malaysia ('the third respondent') to change her name from Syarifah Nooraffyzza binti Wan Hosen to Vanessa Elizabeth. The High Court Judge ('the HCJ') dismissed the appellant's application on the ground that the High Court was not seized with the jurisdiction to hear apostasy matters. Hence, the present appeal. The appellant submitted that her application for leave for judicial review ought to be granted as it was clear that there was a point for investigation on a full *inter partes* basis with necessary evidence on the facts and argument of the law. In resisting the appellant's appeal, the respondents submitted that the dismissal by the HCJ was correct as the question whether a person was a Muslim or not was a matter falling under the jurisdiction of the Syariah Court. The issue that arose for the court's adjudication was whether the Sarawak Syariah High Court had the jurisdiction to deal with the question of apostasy.

Held (dismissing appeal)
Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

(1) The interpretation that reflects the state of the law today is that the Syariah Court, and not the civil court, has the jurisdiction to deal with the issue of conversion out of Islam. Since matters on conversion to Islam come under the jurisdiction of the Syariah Court, by implication, the conversion out of Islam should also fall under the jurisdiction of the same court. Requiring apostates to go through the Syariah Court system in order to convert is not an infringement of the individual's constitutional right because if a person professes and practices Islam, it would definitely mean that he/she must comply with the Islamic law which has prescribed the way to embrace Islam and converting out of Islam (*Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam (PERKIM) Kedah & Anor*) ('*Soon Singh*'). (paras 31 & 33)

(2) The decision in *Soon Singh* should not be distinguished from the present case just because that case was with regard to Kedah State Laws which were only applicable to the State of Kedah. *Soon Singh* had interpreted the provision of art. 121(1A) of the Federal Constitution and was therefore applicable to all states in Malaysia. The HCJ did not err in law in holding that the High Court had no jurisdiction to hear apostasy matters. The matter was within the exclusive jurisdiction of the Syariah Court and not the civil court. (paras 35, 37 & 39)

Bahasa Malaysia *Headnotes*

Selepas keluar daripada Islam dan memeluk agama Kristian pada 2009, perayu, seorang berbangsa Melayu, telah ke Jabatan Pendaftaran Negara untuk menukar namanya dalam kad pengenalan. Walau bagaimanapun, dia dimaklumkan surat keluar daripada Islam ('surat') oleh Pengarah Jabatan Agama Islam Sarawak ('responden pertama') diperlukan. Perayu memohon surat tersebut daripada responden pertama tetapi tidak menerima apa-apa respon. Perayu kemudian dimaklumkan oleh pejabat responden pertama bahawa dia perlu ke Mahkamah Syariah dan menghadiri sesi kaunseling. Perayu memfailkan permohonan kebenaran semakan rayuan di Mahkamah Tinggi terhadap responden-responden dan memohon (i) pengisytiharan bahawa dia seorang Kristian; dan (ii) perintah-perintah *mandamus* mendesak (a) responden pertama dan/atau Majlis Agama Islam ('responden kedua') mengeluarkan surat tersebut; dan (b) Ketua Pengarah Pendaftaran Negara ('responden ketiga') menukar namanya daripada Syarifah Nooraffyzza binti Wan Hosen menjadi Vanessa Elizabeth. Hakim Mahkamah Tinggi ('HMT') menolak permohonan perayu atas alasan Mahkamah Tinggi tiada bidang kuasa mendengar hal perkara murtad. Maka timbul rayuan ini. Perayu menghujahkan permohonan kebenaran semakan kehakimannya wajar dibenarkan kerana jelas terdapat hujah-hujah untuk disiasat secara *inter partes* dengan keterangan fakta dan hujahan undang-undang. Membantah rayuan

perayu, responden-responden menghujahkan penolakan HMT betul kerana persoalan sama ada seseorang Muslim atau tidak adalah hal perkara yang terangkum bawah bidang kuasa Mahkamah Syariah. Isu yang berbangkit bagi pertimbangan mahkamah adalah sama ada Mahkamah Tinggi Syariah Sarawak berbidang kuasa mendengar persoalan murtad.

Diputuskan (menolak rayuan)

Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman mahkamah:

(1) Tafsiran yang mencerminkan kedudukan undang-undang semasa adalah Mahkamah Syariah, dan bukan mahkamah sivil, yang berbidang kuasa mendengar isu murtad. Oleh kerana hal-hal perkara pemelukan Islam terangkum bawah bidang kuasa Mahkamah Syariah, implikasinya adalah keluar daripada Islam juga harus terangkum bawah bidang kuasa mahkamah yang sama. Mengkehendaki agar orang yang murtad melalui sistem Mahkamah Syariah untuk keluar daripada Islam bukan satu pelanggaran hak perlembagaan individu tersebut kerana jika seseorang itu boleh menganut dan mengamalkan Islam, ini bermakna dia boleh mematuhi undang-undang Islam yang menetapkan cara memeluk Islam dan keluar daripada Islam. (*Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam (PERKIM) Kedah & Anor*) ('*Soon Singh*').

(2) Keputusan dalam *Soon Singh* tidak patut dibezakan dengan kes ini hanya kerana kes tersebut melibatkan undang-undang negeri Kedah yang hanya terpakai pada negeri Kedah. *Soon Singh* mentafsir peruntukan per. 121(1A) Perlembagaan Persekutuan dan, dengan itu, terpakai pada kesemua negeri di Malaysia. Hakim Mahkamah Tinggi tidak terkhilaf bawah undang-undang dalam memutuskan Mahkamah Tinggi tiada bidang kuasa mendengar hal-hal perkara murtad. Hal perkara ini terletak secara eksklusif dalam bidang kuasa Mahkamah Syariah dan bukan mahkamah sivil.

Case(s) referred to:

Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association [1990] 2 CLJ 734; [1990] 1 CLJ Rep 33 SC ***(refd)***

Barkath Ali Abu Backer v. Anwar Abu Backer & Ors [1997] 2 CLJ Supp 295 HC ***(refd)***

Chin Mee Keong & Ors v. Pesuruhjaya Sukan [2007] 5 CLJ 363 CA ***(refd)***

Clear Water Sanctuary Golf Management Bhd v. Ketua Pengarah Perhubungan Perusahaan & Anor [2007] 10 CLJ 111 HC ***(refd)***

Dato' Kadar Shah Tun Sulaiman v. Datin Fauziah Haron [2008] 4 CLJ 504 HC ***(refd)***

In the Estate of Tunku Abdul Rahman Putra ibni Almarhum Sultan Hamid [1998] 4 CLJ 838 HC ***(refd)***

Jenny Peter @ Nur Muzahlifah Abdullah v. Director of Jabatan Agama Islam Sarawak & Ors & Another Appeal [2016] 1 LNS 1132 CA ***(refd)***

Kamariah Ali lwn. Kerajaan Negeri Kelantan, Malaysia Dan Satu Lagi Dan Rayuan Yang Lain [2002] 3 CLJ 766 CA ***(refd)***

Latifah Mat Zin v. Rosmawati Sharibun & Anor [2007] 5 CLJ 253 FC ***(refd)***

A *Lim Chan Seng lwn. Pengarah Jabatan Agama Islam Pulau Pinang & Satu Kes Yang Lain [1996] 3 CLJ 231 HC* ***(refd)***
Lina Joy lwn. Majlis Agama Islam Wilayah Persekutuan & Yang Lain [2007] 3 CLJ 557 FC ***(refd)***
Mkini Dotcom Sdn Bhd & Ors v. Chief Judge of Malaya & Ors [2015] MLJU 1271 ***(refd)***
Ng Wan Chan v. Majlis Ugama Islam Wilayah Persekutuan & Anor [1991] 2 CLJ 1559;
B *[1991] 3 CLJ (Rep) 328 HC* ***(refd)***
Nor Kursiah Baharuddin v. Shahrul Lamin & Anor [1997] 1 CLJ Supp 599 HC ***(refd)***
Pentadbir Tanah Daerah Seberang Perai Tengah & Anor v. Bagan Serai Housing Estate Sdn Bhd [2016] 8 CLJ 846 CA ***(refd)***
R v. Secretary of State for the Home Department, ex parte Rukshanda Begum [1990] COD 107 ***(refd)***
C *Robert Linggi v. The Government of Malaysia [2011] 7 CLJ 373 HC* ***(refd)***
Subashini Rajasingam v. Saravanan Thangathoray [2007] 7 CLJ 584 HC ***(refd)***
Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor [2004] 6 CLJ 398 HC ***(refd)***
Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA ***(refd)***
D *Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Bhd [1995] 3 CLJ 627 SC* ***(refd)***
WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***

Legislation referred to:
Federal Constitution, arts. 11, 121(1A), 161E

E **Other source(s) referred to:**
Farid Sufian Shuaib, *Constitutional Restatement of Parallel Jurisdiction between Civil Courts and Syariah Courts in Malaysia: Twenty Years on (1980-2008)* [2008]" 5 MLJ xxxiii pp xxxiii-l
Salbiah Ahmed, *Islam in Malaysia: Constitutional and Human Rights Perspectives*, Muslim World Journal of Human Rights 2, No 1 (2005)

F *For the appellant - Baru Bian, Chua Kuan Ching & Joshua Parir Baru; M/s Baru Bian Advocs*
For the 1st, 2nd & 4th respondents - Saferi Ali, Senior State Counsel, Hisyamudin Roslan, State Legal Officer; State Attorney-General's Chambers
For the 3rd respondent - Shamsul Bolhassan; SFC

G *[Editor's note: For the High Court judgment, please see Syarifah Nooraffyzza Wan Hosen v. Director Of Jabatan Agama Islam Sarawak & Ors [2015] 3 CLJ 399 (affirmed).]*

Reported by Najib Tamby

H **JUDGMENT**

Mohd Zawawi Salleh JCA:

Introduction

I **[1]** This is an appeal from an order made by Rhodzariah Bujang J ("the learned judge") of the High Court of Sabah and Sarawak at Kuching dated 5 January 2015, dismissing the appellant's application for leave to move for judicial review against the respondents.

[2] The central issue in this instant appeal is whether the Sarawak Syariah High Court has jurisdiction to deal with the question of apostasy. A

[3] We have carefully considered the able arguments that have been presented on behalf of the appellant and the respondents and the evidence on record, as well as the judgment in the court below. We have come to the conclusion that this instant appeal ought to be dismissed. We now provide the detailed reasons for our decision. B

Facts Of The Case

[4] The essential facts which are relevant and germane for disposal of this instant appeal may be shortly stated as follows: C

(a) The appellant, a Malay by race, was born on 9 November 1982. Both her parents practiced the religion of Islam.

(b) The appellant left the religion of Islam and embraced Christianity on 3 October 2009 and she was baptised in the All Saints' Chapel, Tabuan Dayak, Kuching, Sarawak. D

(c) On 26 July 2011, the appellant went to the National Registration Department, Kuching to apply for change of her name in her NRIC. The National Registration Department informed her by letter that she has to first obtain the letter of release from Islam from the first respondent's office. E

(d) On 3 August 2011, the appellant wrote a letter to the first respondent's office for the letter of release from Islam. The appellant did not receive any reply from the first respondent.

(e) On 9 July 2012, the appellant once again went to the first respondent's office and met one Ustazah Hanisah Nahrawi who informed her that she has to go to the Syariah court and attend counselling sessions as an adherence procedure to renounce Islam. The session never materialised. Her lawyer's request for a list of criteria to be fulfilled in order to renounce Islam also has not been successful. F G

(f) The appellant then filed an application for *ex parte* leave to move for judicial review against the respondents and sought the following reliefs:

(i) a declaration that she is a Christian;

(ii) an order of *mandamus* to compel the first and/or second respondents to issue the letter of release from the religion of Islam; and H

(iii) an order of *mandamus* to compel the third respondent to change the appellant's name from Syarifah Noorafyzza binti Wan Hosen to Vanessa Elizabeth; I

(g) On 5 January 2015, the learned judge dismissed the appellant's application for leave to commence judicial review against the respondents.

(h) Being dissatisfied with the said order, the appellant appealed to this court. Hence, this appeal before us.

Findings Of The Learned Judge

[5] The principal reason for the dismissal of the appellant's application was on jurisdictional ground. The learned judge reasoned as follows:

> Jurisdictional Issue
>
> The Federal Courts have consistently spoken that apostasy is a matter within the jurisdiction of the Syariah Court. For reference I would list the cases as follows:
>
> (i) *Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489;
>
> (ii) *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v. Shaik Zolkaffily bin Shaik Natar & Ors* [2003] 3 MLJ 705;
>
> (iii) *Lina Joy lwn. Majlis Agama Islam Wilayah Persekutuan Dan Lain-Lain* [2007] 4 MLJ 585; and
>
> (iv) *Hj Raimi bin Abdullah v. Siti Hasnah Vangarama Abdullah And Another Appeal* [2014] 3 MLJ 757.
>
> The Federal Court in its latest decision in *Hj Raimi*'s case have decided, following that of *Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 2 CLJ 5; [1999] 1 MLJ 489; held that the issue of whether a person is a Muslim or not falls within the exclusive jurisdiction of the Syariah Court because 'since matters on conversion to Islam come under the jurisdiction of the Syariah Court by implication conversion out of Islam should also fall under the jurisdiction of the same courts' (per Mohd Dzaiddin FCJ in *Soon Singh*'s case).
>
> The argument of the applicant that the Majlis Agama Islam Sarawak Ordinance does not provide for renunciation of Islam; only conversion under s. 68 and s. 69 thereof and therefore the applicant can seek recourse from the civil courts, cannot in the face of the words underlined above be accepted as even the various State Enactment in Peninsular Malaysia mentioned in His Lordship's judgment also do not have a specific provision on the renouncement.

[6] Concerning the appellant's assertion that art. 121(1A) of the Federal Constitution was enacted without the consent of the Yang di-Pertua Negeri of Sabah and Sarawak, the learned judge stated at p. 7 of the grounds of judgment as follows:

> [8] As for the argument of the applicant that art. 121(1A) of the Federal Constitution was made without the consent of the Yang di-Pertua Negeri of Sabah and Sarawak, the same argument was taken up before David

Wong Dak Wah J (as His Lordship then was) in *Robert Linggi v. The Government of Malaysia* [2011] 2 MLJ 741; [2011] 7 CLJ 373 and in a supplementary judgment appearing at p. 764 (MLJ); p. 398 (CLJ) thereof, His Lordship has reproduced the letters of consent from the Yang di Pertua Negeri of both states which clearly show that such a concurrence was in fact obtained before the amendment to art 121 was made and that includes the introduction of art. 121(1A). Coming as it were from the judgment of the court of not just competent jurisdiction but also from the same part of Malaysia, I have no doubt on the veracity of what is reproduced in that judgment.

[7] The learned judge then concluded that:

[10] … Unless and until the applicant obtains her letter of release from Islam, the 3rd respondent cannot be compelled by *mandamus* to effect the change that she wanted. The first respondent in turn cannot be compelled to issue the letter of release by me because I do not have the jurisdiction over matters of apostasy which is the sole province of the Syariah Courts as having been decided by the Federal Court cases I have listed above. In arriving at this decision I am fully aware of the guarantee of the freedom of religion in the Federal Constitution and that I had taken an oath of office to uphold its provisions. I have been reminded of the sanctity of the relevant provisions by the applicant's counsel but I believe I am not committing a sacrilege of that oath in this case because in the exercise of my duties I am also dictated by doctrines and conventions. The application for leave is therefore dismissed but with no order as to cost as graciously agreed by the respondents' counsel.

Principles Applicable To An Application For Leave

[8] At the outset, perhaps it would be useful to state briefly principles applicable for granting leave for judicial review. The Federal Court had elaborated and reiterated the test for granting leave in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478 as follows:

... without the need to go into depth of the abundant authorities, suffice if we state that leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though i.e, unless the matter for judicial review is amenable to judicial review absolutely no success may be envisaged.

[9] In *Mkini Dotcom Sdn Bhd & Ors v. Chief Judge of Malaya & Ors* [2015] MLJU 1271, it was held that:

[10] It is settled law, the function of the Court in exercising its power to grant leave for judicial review is to sieve through the application before it by examining the facts and the law and decide if the case is one which is frivolous and or one which merits further argument on the substantive

A motion. In exercising this function the Court is guided by the principles laid down by the Court of Appeal in England in *R v. Secretary of State for Home Department, ex parte Rushkanda Begum* [1990] Crown Office Digest 109, Dip as follows:

(i) If it is clear to the judge that there is a point for further investigation on a full *inter parte* basis with all evidence as is reasonably necessary on the facts and all such arguments on the law then leave ought to be granted;

(ii) If the judge hearing the leave application is satisfied that there is no arguable case the judge should dismiss the application for leave to move for leave for judicial review; and

(iii) If the judge is not really sure whether there is or is not an arguable case, the judge may invite the putative respondent to attend and submit as to whether or not leave ought to be granted; and

(iv) In exercising the powers in an *inter parte* leave application the test applicable by the Court must be the same approach as that as the test adopted in deciding whether to grant leave to appeal against the arbitrator's award. The Court has to consider the facts and law before it and ask itself whether the Court is satisfied that there is a case fit for further consideration or otherwise.

[10] In *Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Bhd* [1995] 3 CLJ 627; [1995] 2 MLJ 442, the Supreme Court approved the following guidelines stated in *R v. Secretary of State for the Home Department, ex parte Rukshanda Begum* [1990] COD 107:

thus: leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting leave the relief sought at the substantive hearing may be the resultant outcome. A rider must be attached to application though i.e. unless the matter for judicial review is amenable to judicial review no success may be envisaged.

Parties' Competing Submissions

[11] Counsel for the appellant submitted that the learned judge erred in law in dismissing the appellant's leave to move for judicial review. According to counsel, at this stage of the proceedings, the court need not go into the matter in any depth. All that the appellant need to establish for leave to be granted is there is a *prima facie* case and the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application. (See *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927; *Chin Mee Keong & Ors v. Pesuruhjaya Sukan* [2007] 5 CLJ 363; *Clear Water Sanctuary Golf Management Bhd v. Ketua Pengarah Perhubungan Perusahaan & Anor* [2007] 10 CLJ 111, *Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association* [1990] 2 CLJ 734; [1990] 1 CLJ Rep 33; *Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor* [2004] 6 CLJ 398; [2004] 6 MLJ 53).

[12] Counsel for the appellant further submitted that leave to move for judicial review ought to be granted to the appellant as it is clear that there is point for further investigation on a full *inter parties* basis with necessary evidence on the facts and argument on the law.

[13] Counsel posited that the appellant's application involves prayers and/or remedies concerning the enforcement of fundamental liberties guaranteed under the Federal Constitution ie, freedom of religion under art. 11 of the Federal Constitution and therefore could not be in any way regarded as vexatious or frivolous.

[14] In reply, learned Senior Federal Counsel appearing for the respondents submitted that leave to move for judicial review was correctly dismissed by the learned judge. The apex court has consistently decided that apostasy is a matter within the exclusive jurisdiction of the Syariah court. In *Hj Raimi bin Abdullah v. Siti Hasnah Vangrama Abdullah And Another Appeal (supra)*, the Federal Court held that the question whether a person was a Muslim or not was a matter falling under the exclusive jurisdiction of Syariah court.

Our Decision

[15] We noted that during the hearing for leave to move for judicial review, in the court below, learned Senior Federal Counsel appearing for the first, second and fourth defendants had taken preliminary objection that the High Court has no jurisdiction to hear the matter.

[16] It is trite that once jurisdiction is challenged, the court may not decide on the merits of the case without first determining whether it has jurisdiction over the subject matter. Jurisdiction is a question of law and a court is precluded from adjudicating the matter on merits when it lacks jurisdiction. Therefore, the question of jurisdiction has to be decided first. (See *Pentadbir Tanah Daerah Seberang Perai Tengah & Anor v. Bagan Serai Housing Estate Sdn Bhd* [2016] 8 CLJ 846).

[17] Jurisdiction is everything and without it, the court must down its tools.

[18] Counsel for the appellant vehemently submitted that the applicable laws governing Islamic matters in Sarawak are Syariah Court Ordinance 2001 and Majlis Agama Islam Sarawak Ordinance 2001. These Ordinances did not provide for matters relating to apostasy or conversion out of the religion of Islam. Therefore, in the absence of any laws, rules, regulations and/or any ordinance or legislation which prohibit the appellant from converting out of Islam in Sarawak, art. 11 of the Federal Constitution is the only governing law relating to apostasy and/or conversion out of Islam.

[19] Article 11 of the Federal Constitution provides for freedom of religion. Article 11 does not explicitly forbid apostasy.

[20] To put our discussion in its proper perspective, perhaps it would be useful at the outset to note that Malaysia has a unique system of legal pluralism. Two sets of law coexist: civil law (common law) and Syariah law and there is a dual court system comprising the Civil Courts and the Syariah courts. The latter have jurisdiction to apply Syariah law to Muslims and civil courts have jurisdiction to apply civil law to Muslims and non-Muslims.

[21] The Federal Constitution was amended in 1988 to clarify the distribution of jurisdiction between civil courts and Syariah courts. According to Farid Sufian Shuaib, in an article entitled: "*Constitutional Restatement of Parallel Jurisdiction between Civil Courts and Syariah Courts in Malaysia: Twenty Years on (1980-2008)* [2008]" 5 MLJ xxxiii pp xxxiii-l:

> The Federal Constitution of Malaysia has restated under art. 121(1A) that Syariah Courts - as the courts that administer Islamic law - have exclusive jurisdiction over matters under their jurisdiction. The premise of the restatement is to give effect to a pluralistic law and court system as it existed in Malaysia ... .

[22] It would appear that there are two different interpretations of art. 121(1A) of the Federal Constitution resulting from 1988 amendment - the parallel and hierarchical interpretations. According to parallel interpretation, Syariah courts and civil courts form two separate courts system. Syariah Courts are not inferior to the civil courts. In the case of *Latifah Mat Zin v. Rosmawati Sharibun & Anor* [2007] 5 CLJ 253; [2007] 5 MLJ 101 (FC), Abdul Hamid Mohamad FCJ (as he then was) explained:

> The point to note here is that both courts, civil and syariah, are creatures of statutes. Both owe their existence to statutes, the Federal Constitution, the Acts of Parliament and the State Enactments. Both get their jurisdictions from statutes i.e. Constitution, federal law or State law, as the case may be.

[23] According to the hierarchical interpretation, Syariah courts, as State courts, are inferior to the civil courts. In the case of *Dato' Kadar Shah bin Tun Sulaiman v. Datin Fauziah Haron* [2008] 4 CLJ 504; [2008] 7 MLJ 779, Mohd Hishamudin J (as he then was) said:

> In my judgment, where there is an issue of competing jurisdiction between the civil court and the Syariah Court, the proceedings before the High Court of Malaya or the High Court of Sabah and Sarawak must take precedence over the Syariah Courts as **the High Court of Malaya and the High Court of Sabah and Sarawak are superior civil courts, being High Courts duly constituted under the Federal Constitution**. Syariah Courts are mere state courts established by state law, and under the Federal

> Constitution these state courts do not enjoy the same status and powers as the High Courts established under the Courts of Judicature Act 1964. Indeed, the High Courts have supervisory powers over Syariah Courts just as the High Courts have supervisory powers over other inferior tribunals like, for instance, the Industrial Court. (emphasis added)

[24] The view that art. 121(1d) of the Federal Constitution does not exclude the supervisory review power of the High Court is supported by several commentators, such as Andrew Harding (Law, Government and the Constitution of Malaysia, 136-7 (1996), Thio Li-Ann (in an essay in "Constitutional Landmarks in Malaysia: The first 50 Years", 197 at 202).

[25] We are of the view that Syariah courts and civil courts form two separate legal system. We agree with the view expressed by Salbiah Ahmed in her article entitled: "*Islam in Malaysia: Constitutional and Human Rights Perspectives*", Muslim World Journal of Human Rights 2, No. 1 (2005), when she assets that:

> State Syariah Courts are not courts inferior to the Federal Courts as the term "inferior court" is understood in terms of appeal and judicial review by superior courts over inferior courts. The State Syariah Courts are in a separate hierarchy to that of the federal civil courts. There is no right of appeal from the State Syariah courts to the federal civil courts. There is no power of judicial review by the federal high court over the State Syariah Courts.
>
> (See also Hassan Saeed, "*Freedom Religion, Apostasy and Islam*" (2004) 149 at 150).

[26] In the same vein, in *Kamariah Ali lwn. Kerajaan Negeri Kelantan, Malaysia Dan Satu Lagi Dan Rayuan Yang Lain* [2002] 3 CLJ 766; [2002] 3 MLJ 657, Abdul Hamid Mohamed JCA (as he then was) said:

> ... bukanlah dalam bidang kuasa Mahkamah ini untuk mengkaji semula keputusan-keputusan mahkamah syariah yang terletak dalam sistem berlainan itu. Mahkamah ini mesti menerima Mahkamah Tinggi Syariah itu telahpun membuat keputusan fakta itu, mengikut hukum syarak dan mahkamah ini tidak berkuasa campur tangan dalam keputusan itu dan menggubahnya, membatalkannya, mengisytiharkan ia tidak sah atau tidak menghiraukan dan membebaskan perayu-perayu ... .

(See also *Nor Kursiah Baharuddin v. Shahril Lamin & Anor* [1997] 1 CLJ Supp 599; [1997] 1 MLJ 537).

[27] In *Subashini Rajasingam v. Saravanan Thangathoray* [2007] 7 CLJ 584, a case concerning the custody of children when one parent had converted to Islam, the demarcation between the civil and Syariah courts was interpreted to mean that Syariah courts "are not lower in status than civil courts ... they are of equal standing under the (Federal Constitution) (at [23]).

[28] The issue of the alleged lacking of "jurisdiction" of the Syariah court to hear apostasy case is no doubt due the failure of the States' Administration of Islamic Law Enactments, and in the case of Sarawak, the Syariah Court Ordinance 2001, to incorporate fully and comprehensively the matters enumerated under List II (State List) of the Ninth Schedule of the Federal Constitution, including the matter relating to apostasy.

[29] In a series of cases, *inter alia*, *Ng Wan Chan v. Majlis Ugama Islam Wilayah Persekutuan & Anor* [1991] 2 CLJ 1559; [1991] 3 CLJ (Rep) 328; [1991] 3 MLJ 487, *Lim Chan Seng lwn. Pengarah Jabatan Agama Islam Pulau Pinang & Satu Kes Yang Lain* [1996] 3 CLJ 231; *Barkath Ali Abu Backer v. Anwar Abu Backer & Ors* [1997] 2 CLJ Supp 295; [1997] 4 MLJ 389, In the *Estate of Tunku Abdul Rahman Putra ibni Almarhum Sultan Hamid* [1998] 4 CLJ 838; [1998] 4 MLJ 623, the courts held that the existence of a particular subject matter under Item I of the State List does not automatically mean Syariah courts have jurisdiction over the subject matter. State Legislatures need to expressly confer such jurisdiction to Syariah courts.

[30] In *Lina Joy lwn. Majlis Agama Islam Wilayah Persekutuan & Yang Lain* [2007] 3 CLJ 557; [2007] 4 MLJ 585, Richard Malanjum Chief Judge (Sabah & Sarawak) in his dissenting judgment said:

> [99] In *Ng Wan Chan v. Majlis Ugama Islam Wilayah Persekutuan & Anor (No 2)* [1991] 3 MLJ 487 Eusof Chin J (as he then was) who incidentally was also on the panel that decided Soon Singh case said this at p. 489:
>
> > The Federal Constitution, Ninth Schedule List II - State List, specifically gives powers to state legislatures to constitute Muslim courts and when constituted, 'shall have jurisdiction only over persons professing the Muslim religion and in respect only of any of the matter included in this paragraph'.
> >
> > Therefore, a Syariah Court derives its jurisdiction under a state law, (for Federal Territories - Act of Parliament) over any matter specified in the State List under the Ninth Schedule of the Federal Constitution.
> >
> > If state law does not confer on the Syariah court any jurisdiction to deal with any matter stated in the State List, the Syariah Court is precluded from dealing with the matter. Jurisdiction cannot be derived by implication.
>
> [100] And in *Lim Chan Seng v. Pengarah Jabatan Agama Islam Pulau Pinang* [1996] 3 CLJ 231 the learned High Court Judge was of the view that art. 121(1A) by itself did not automatically confer jurisdiction on the Syariah Court, even on matters that fell under the State List of the Ninth Schedule. It was the view of the learned Judge that the state legislature must first act upon the power given it by arts. 74 and 77 of the Constitution and the State List and thus enact laws conferring the jurisdiction.
>
> …

> [104] Hence, I am in agreement with those views in that jurisdiction must be express and not implied. The doctrine of implied powers must be limited to those matters that are incidental to a power already conferred or matters that are necessary for the performance of a legal grant. And in the matters of fundamental rights there must be as far as possible be express authorisation for curtailment or violation of fundamental freedoms. No court or authority should be easily allowed to have implied powers to curtail rights constitutionally granted.

[31] In our view, the interpretation that reflects the state of the law today is that the Syariah court and not the civil court has the jurisdiction to deal with the issue of conversion out of Islam. The constitutional and jurisdictional issues as to whether the Syariah court has jurisdiction to deal with the questions of apostasy was clarified by Mohamad Dzaiddin FCJ (as he then was) in the case of *Soon Singh Bikar Singh (supra)* wherein His Lordship said:

> … it does seem inevitable that since matters on conversion to Islam come under the jurisdiction of the syariah courts, by implication conversion out of Islam should also fall under the jurisdiction of the same courts.

[32] In *Lina Joy (supra)*, the majority opinion affirmed the implied jurisdiction approach taken in *Soon Singh Bikar Singh (supra)*. Ahmad Fairuz CJ said:

> … the case of *Soon Singh* clearly showed that the apostate matter was within the jurisdiction of the Syariah Court. Item I, Second list, Ninth Schedule of the Federal Constitution showed that the Islamic law was one of the matters that was in item I and when read together with case of *Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992]1 MLJ 1 thus it was obvious that the apostasy matter relating to Islamic law and it was clear that it was within the jurisdiction of the Syariah Court… .

[33] The learned CJ added that requiring apostates to go through the Syariah court system in order to convert is not an infringement of the individual's constitutional right because "((i)f a person professes and practices Islam, it would definitely mean that he must comply with Islamic law which has prescribed the way to embrace Islam and converting out of Islam" (at [17.2]). According to the Chief Justice, "one cannot renounce or embrace a religion at one's own whims and facies" (at [14]).

[34] Recently, in *Hj Raimi Abdullah (supra)*, Arifin Zakaria CJ in delivering the judgment of the Federal Court said:

> [21] Thus, in *James v. Government of Malaysia* [2012] 1 MLJ 721 and *Lina Joy lwn. Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585, it was held that apostasy was a matter within the exclusive jurisdiction of the Syariah Court.
>
> [22] Premised on the above authorities, it is settled law that the question of whether a person is a Muslim or not is a matter falling under the exclusive jurisdiction of the Syariah Court. On the facts in the present

A case, it is not in dispute that the plaintiff's parents converted to Islam in 1983 together with the plaintiff and her siblings. This is supported by the statutory declaration of the late father referred to earlier.

[35] We are not persuaded that the decision in *Soon Singh Bikar Singh* should be distinguished from the present case as that case was with regard B to Kedah State laws and only applicable to the State of Kedah. In our view, *Soon Singh Bikar Singh* had interpreted the provision of art. 121(1A) of the Federal Constitution and therefore applicable to all states in Malaysia. At p. 489, Mohamed Dzaiddin FCJ (as he then was) stated:

> Be that as it may, in our opinion, the jurisdiction of the Syariah Courts C to deal with the conversion out of Islam, although not expressly provided in the State Enactments, can be read into them by implication derived from the provisions concerning conversion into Islam. It is a general rule of construction that if the meaning of a statute is not plain, it is permissible in certain cases to have recourse to a construction by implication and the court may draw inferences or supply the obvious D omissions.

[36] It is clear, therefore, that our apex court had consistently and repeatedly held that jurisdiction of the Syariah court regarding apostasy need not be expressly laid out in the state laws. We are in full agreement in the decision of this court in *Jenny Peter @ Nur Muzahlifah Abdullah v. Director of* E *Jabatan Agama Islam Sarawak & Ors & Another Appeal* [2016] 1 LNS 1132, wherein the court stated:

> Although the Sarawak Syariah Courts Ordinance 2001 did not provide for the conversion in or out of Islam, Part VIII of the Majlis Islam Sarawak Ordinance 2001 provides for conversion to the religion of Islam. In this F regard it is pertinent to highlight the majority judgment in *Lina Joy (supra)* at pg 616, which affirmed the decision of the Federal Court in *Soon Singh*:
>
> 15.5 ... adalah sejajar dengan logik untuk Mahkamah Syariah, yang telah dengan jelasnya diberi bidang kuasa untuk mengadili perkara-perkara yang berkaitan dengan pemelukan agama Islam adalah, secara implikasi perlu, G juga mempunyai bidang kuasa untuk mengadili perkara-perkara yang berkaitan dengan keluarnya seorang Muslim dari agama Islam atau kemurtadan.

[37] We are satisfied that the learned judge did not err in law in holding that the High Court had no jurisdiction to hear apostasy matters.

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[38] Now we turn to the appellant's submission that art. 121(1A) of the Federal Constitution was enacted without the consent of Yang di-Pertua Negeri of Sabah and Sarawak. The submission flies in the face of the evidence. In *Robert Linggi v. The Government of Malaysia* [2011] 7 CLJ 373, the learned judge stated that the issue relating to art. 121 of the Federal I Constitution was put in abeyance "pending production by counsel for the defendant of the originating consent of the Yang di-Pertua Negeri Sabah". However, subsequently, the learned judge, in his supplementary judgement,

after consent Yang di-Pertua Negeri of Sabah and Sarawak was furnished, dismissed the plaintiff's claim that art. 121 cl. (1) contravenes art. 161E of the Federal Constitution.

Conclusion

[39] For the foregoing reasons, we agree with the conclusion of the learned judge that the appellant's application for leave to move for judicial review against the respondents ought to be dismissed as the matter is within the exclusive jurisdiction of Syariah court and not the Civil High Court. Accordingly, we dismiss the appeal with no order as to costs. Deposit was refunded. So ordered.